

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of Minnesota Department of  
Natural Resources Special Permit No.  
16868 (December 12, 2012) Issued to  
Lynn Rogers

**SECOND ORDER REGARDING  
MOTION TO COMPEL**

This matter was heard by Chief Administrative Law Judge Tammy L. Pust from February 24, 2014 through March 6, 2014.

David R. Marshall, Leah C. Janus and Jessica L. Edwards, Fredrikson & Byron, P.A., appeared on behalf of Dr. Lynn Rogers (Rogers).

David P. Iverson and Linda S. Jensen, Assistant Attorneys General, appeared on behalf of the Department of Natural Resources (Department or DNR).

On April 4, 2014, Rogers brought a Motion to Compel Recently Discovered Documents Withheld by the DNR. The Department filed a response to the motion on April 11, 2014.

On April 13, 2014, the Chief Administrative Law Judge issued an Order Regarding Motion to Compel requiring the Department to provide certain identified data for in camera inspection. On April 15, 2014, the Department provided documentation in response to the Order, albeit not on a timely basis.

Based upon the evidence and argument submitted by the parties, and the files and proceedings herein, the Chief Administrative Law Judge makes the following:

**ORDER**

1. The Motion to Compel Recently Discovered Documents Withheld by the DNR is GRANTED with respect to certain documentation provided, under seal, to the Department with a copy of this Order. Upon receipt thereof, the Department is directed to: (1) appropriately redact identifying information related to non-DNR employees, pursuant to the Minnesota Government Data Practices Act; (2) mark any documents covered by the Second Amended Protective Order issued in this matter; and (3) produce same to Rogers, through his counsel of record.

2. As a sanction for its failure to provide the identified documentation pursuant to Rogers' duly-served discovery request, the Department is ordered to reimburse Rogers for the cost of bringing the Motion to Compel Recently Discovered Documents Withheld by the DNR, the amount of which shall be established by affidavit filed by Rogers' counsel of record on or before 4:30 p.m. on April 23, 2014. If the Department disagrees that the amounts listed in the filed affidavit are reasonable, it shall submit a memorandum of law relative to that position by 4:30 p.m. on April 25, 2014, after which a further Order will be issued.

Dated: April 17, 2014

s/Tammy L. Pust  
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TAMMY L. PUST  
Chief Administrative Law Judge

### MEMORANDUM

During the discovery phase of this matter, Rogers served on the Department the following discovery requests:

Request for Documents No. 2:

All documents, including correspondence and emails, sent by any representative of the DNR to any person or entity relating to Dr. Lynn Rogers, Sue Mansfield, or Wildlife Research Institute.

Request for Documents No. 3:

All documents, including correspondence and emails, received by any representative of the DNR to any person or entity relating to Dr. Lynn Rogers, Sue Mansfield, or Wildlife Research Institute.

The Department produced various documents in response, as required by applicable rules of discovery.<sup>1</sup>

The Department did not produce various emails and a draft manuscript prepared by Dr. David Garshelis (Garshelis), a DNR employee. Rogers learned of the existence of these documents on or about March 24, 2014, several weeks after the hearing in this matter was concluded, and immediately demanded their production. The Department apparently ignored the request, prompting Rogers to file the present motion.

In response to the Chief Administrative Law Judge's Order, the Department submitted 478 pages of documentation for *in camera* inspection. Most of the submission

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<sup>1</sup> See Minn. R. 1400.6700; Rules 26 and 34, Minn. R. Civ. P.

consisted of multiple copies of 25-40 email chains between prospective co-authors of a scientific paper, plus a copy of the 34-page draft of the paper itself. Only two pages of the draft paper and 26 pages of the email exchanges contain any references or relate in any manner to Rogers or his work at the Wildlife Research Center.

These 28 pages are clearly responsive to the discovery requests, and should have been produced under the applicable rules of discovery. In its response to the motion, the Department explained that Garshelis determined that disclosure of these documents was not required in that “he did not think it was germane to Rogers research permit issue.”<sup>2</sup> Garshelis testified, by affidavit, that because Rogers was not participating in the authorship and in fact disagreed with the content of the paper, it would be “scientifically unethical” for Rogers to obtain a copy of the draft paper, and so he chose not to produce it.<sup>3</sup>

He did so in contravention of the rules of discovery that govern this matter. Contrary to Garshelis’ apparent belief, there is no universally recognized scholar’s privilege which provides absolute protection for all drafts of potential scientific publications from the legal rules of discovery,<sup>4</sup> nor has counsel for the Department attempted to establish any such privilege relevant to the documents at issue.<sup>5</sup> Even if counsel had attempted to protect the identified documents under such a theory, the attempt would have failed with respect to the pages now identified given that the documents consist only of Garshelis’ criticism of a paper published by Rogers and a few assorted emails containing Garshelis’ opinions about Rogers and his endeavors. Garshelis freely testified to these same topics during the hearing, which negates the claim he now makes that the information is deserving of protection. As such, Garshelis’ decision not to produce the identified documents pursuant to Rogers’ discovery requests was in direct contravention of the requirements of the rules of discovery, thus justifying the imposition of sanctions in this matter.

**T. L. P.**

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<sup>2</sup> Minnesota Department of Natural Resources’ Response to Dr. Lynn Rogers’ Motion to Compel Recently Discovered Documents, at p. 2.

<sup>3</sup> Affidavit of David L. Garshelis, ¶ 10.

<sup>4</sup> See *Dow Chem. Co. v. Allen*, 672 F.2d 1262 (7<sup>th</sup> Cir. 1982).

<sup>5</sup> See *Brown v. Saint Paul City Ry. Co.*, 241 Minn. 15, 35, 62 N.W.2d 688, 701 (1954) (“Since exemption from production is the exception and not the rule, the burden is on the party claiming the privilege to show that he is entitled to it”).